



Oil in the waters of Chandeleur Sound, La., on May 4. Photo by Eric Gay, Associated Press

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As oil drifts on and offshore in the Gulf of Mexico, forcing the closure of [wildlife refuges](#) and [more fishing grounds](#), Interior Secretary Ken Salazar has called a [temporarily halt to new offshore drilling](#) while his staff prepare a report on the disaster and even Republicans in Congress [are calling for new investigation](#) of the [troubled Minerals Management Service](#).

Clearly, things didn't go as planned on the Deepwater Horizon. Notwithstanding Rush Limbaugh's [wild accusations of environmentalist sabotage](#), no one has seriously suggested that the fire, the sinking of the rig, and the failure of the blowout preventer were anything but accidental. But that's far from the end of the story. Accidents are not always unforeseeable or unpreventable. BP, its contractors, the Minerals Management Service, and the Coast Guard could have and should have foreseen the possibility of a blowout, but in typical human fashion they preferred a more rosy outlook.

From an environmental law perspective, perhaps the most depressing aspect of this disaster is the extent to which it seemed to catch everyone by surprise. We've long had regulations in place under the National Environmental Policy Act that are intended to force a more careful advance look. But that didn't happen. Dan is right to see this disaster as a call for [better risk assessment](#) for offshore drilling. But (as I know Dan is well aware), simply mandating worst case analysis or better risk assessment won't make it happen. The Gulf oil spill highlights the slippage between the law and the reality of environmental analysis for offshore drilling. It is a story of institutional failure as much as of equipment failure, and the postmortem should include exploration of how the institutions might be improved.

The lesson to be drawn is not that NEPA review is useless. But environmental review as practiced in the US does have some important limits, and even where it could perform well it needs better implementation and oversight. I offer these tentative thoughts about lessons from the Deepwater Horizon for the law and practice of environmental review.

NEPA can't catalyze some of the thinking we should want, because that thinking needs a larger forum. NEPA sets up a project-by-project approach to environmental review. It's hard to see the cumulative effects of a variety of actions from that perspective, as the [Council on Environmental Quality recognizes](#). More than that, NEPA is an awkward tool for comparing a proposed action with very different approaches to achieving the same goal. One goal of offshore drilling in the Gulf, for example, is to reduce dependence on foreign oil. That's a laudable goal with environmental as well as national security implications since, as [Melinda Taylor recently pointed out](#), "the transportation of crude in tankers from the Middle East and elsewhere is responsible for 45 percent of the oceans' oil pollution." But it's a goal that is just as well served by any method of conserving or generating energy.

It's a familiar complaint that NEPA analysis comes too late, after the big decisions are effectively made. As Oliver Houck wrote recently in the [Environmental Law Reporter \(subscription required\)](#):

NEPA is missing the point. It is producing lots of little statements on highway segments, timber sales, and other foregone conclusions; it isn't even present, much less effective, when the major decisions on a national energy policy and a national transportation policy are made.

That's absolutely true, but it's not just a failure of NEPA implementation. We don't have a coherent, transparent, long-term national planning program for energy. We can't make sensible energy policy decisions without a public venting of the life-cycle costs (human and environmental) and benefits of all our available energy production and energy conservation alternatives. We can't expect NEPA analysis of a lease sale, exploration plan, or even of the five-year leasing program to force that analysis, which goes well beyond the competence or interests of MMS. A serious, sustained, broad-scale review of the human and environmental costs of our fossil fuel addiction is the only hope we have of avoiding the "energy amnesia" [Timothy Egan fears we will fall into again](#).

Even within its boundaries, NEPA requires sustained oversight. There were also important failures of NEPA implementation here, which highlight the difficulties NEPA still faces in its attempt to get agencies to look carefully at the environmental consequences of their missions.

As documented in the [Washington Post](#) and other reports, there never was an environmental review that considered the possibility of a large-scale oil spill from the Deepwater Horizon. There was plenty of ink spilled on environmental studies, but none of it came to grips with the risks of or from a serious accident. MMS prepared an [Environmental Impact Statement](#) for the 5-year leasing program, another [EIS for the group of lease sales](#) (the link takes you to Volume 1), and a [supplemental Environmental Assessment](#) for this specific lease sale. Given that paper trail, it might not be troubling that BPs exploration plan was approved without additional environmental review. The problem is that the larger-scale EISs contained only the most minimal and optimistic analysis of the prospects of a spill, yet they were used to justify not conducting any such analysis at the site-specific level.

This problem is not limited to the Deepwater Horizon; it infects the entire Gulf of Mexico leasing program, and perhaps other regions as well. And something much like it happens in other contexts, such as the Forest Service's land management planning program. NEPA was supposed to change agency cultures, to temper the agency's primary missions with concern for the environmental impacts of those missions. While NEPA has changed some agencies, 40 years later it's obvious that culture change from the inside has not been completely effective.

Although change from within may be most desirable and most lasting, it doesn't happen without effective prods from the outside. And NEPA has been sorely lacking in strong prods. The courts have essentially abdicated the field, refusing to force early consideration of environmental effects or to review substantive environmental trade-offs. That leaves the [Council on Environmental Quality](#) in the White House, which has gotten precious little encouragement from recent Presidents. CEQ does get some help from EPA, which is supposed to review and comment on all the EISs prepared by federal agencies. But EPA can only do so much. It did not offer any comments on the [lease sale EIS](#), and although it expressed concerns about the [draft 5-year program EIS](#), ultimately it did not object to [the final EIS](#). It's not clear that anyone ever looked closely at the assumptions about the probability and consequences of oil spills.

It's tough to force change on an unwilling agency, especially change that may interfere with its mission. MMS remains the paradigmatic mission-oriented agency, exceedingly cozy with the oil industry, and true believers in maximizing oil production. In cases like this, it may make sense to step away, at least temporarily, from NEPA's attempt to change agencies from the inside. Instead of letting MMS do environmental review of its activities, maybe Congress should have FWS, NOAA,

and the Coast Guard, the agencies whose missions are most vulnerable to a large spill, do the environmental review, with money from MMS's budget. That should lead to more honest environmental review in the short run, while also providing a powerful incentive to MMS to beef up its environmental review capabilities in order to get that responsibility back.

It also couldn't hurt to have more public review of these documents. That already seems to be happening. Investigative reporters and environmental groups are poring over offshore drilling approvals in the Gulf and elsewhere, and their associated environmental analyses. Just knowing that someone is looking over their shoulder should encourage MMS to take its environmental review duties far more seriously.

Categorical exclusions need to be kept within their intended limits.

Categorical exclusions have a legitimate place in the NEPA process, but because outside oversight is so critical and categorical exclusions evade oversight, they need to be kept within that place.

CEQ invented the categorical exclusion in 1978, when it first issued regulations for implementing NEPA. A [categorical exclusion identifies](#) "a category of actions which do not individually or cumulatively have a significant effect on the human environment," and therefore do not require preparation of an EIS or an EA. Used properly, the idea makes a great deal of sense. NEPA shouldn't forced agencies to shuffle paper for actions that don't affect the environment.

On the other hand, because actions subject to a categorical exclusion may never again be the subject of full environmental review, its vital that categorical exclusions be carefully drawn, and adopted only with a public defense of their scope. That hasn't happened in the Gulf of Mexico. [MMS's NEPA policies](#) include a categorical exclusion for

Approval of an offshore lease or unit exploration, development/production plan or a Development Operation Coordination Document in the central or western Gulf of Mexico except those proposing facilities: (1) In areas of high seismic risk or seismicity, relatively untested deep water, or remote areas, or (2) within the boundary of a proposed or established marine sanctuary, and/or within or near the boundary of a proposed or established wildlife refuge or areas of high biological sensitivity; or (3) in

areas of hazardous natural bottom conditions; or (4) utilizing new or unusual technology.

As far as I can tell, that categorical exclusion has never been publicly explained or defended. The earliest reference I've been able to find (with the help of crack reference librarian Dean Rowan) to it is in a 1980 Federal Register notice (the citation is 45 Fed. Reg. 75336) of proposed revised NEPA procedures for the U.S. Geological Survey, which at the time was in charge of offshore drilling. That notice simply lists this exclusion (in slightly different terms) as one among many; it contains no discussion of how USGS decided that exploration and drilling in the Gulf never have significant environmental impacts. USGS finalized the exclusion in 1981 (46 Fed. Reg. 7485), and when MMS was created and took over supervision of offshore drilling it simply adopted this (and other) exclusions that were already in place (50 Fed. Reg. 9132).

Again as far as I can tell, MMS has never taken a fresh look at this exclusion, while the technology and practice of offshore drilling and environmental goals in the Gulf have changed dramatically. The agency seems to have applied the exclusion aggressively, to hundreds of actions every year. Review of Gulf Coast oil exploration and development applications does look like it has been a bureaucratic rubber stamp operation, at least with respect to environmental review. Approvals under the categorical exclusion [have continued](#) even after the Deepwater Horizon disaster, and even after Interior announced its temporary moratorium on new drilling.

The questionable origin and subsequent abuse of this categorical exclusion provide a powerful argument in support of CEQ's recently proposed [draft guidance on categorical exclusions](#). As CEQ points out

An inappropriate reliance on categorical exclusions may thwart the purposes of NEPA, compromising the quality and transparency of agency decisionmaking as well as the opportunity for meaningful public participation and review.

The draft guidance rightly calls on agencies to better substantiate their categorical exclusions, to make sure they include procedures to evaluate whether specific

actions within the category do in fact pose an environmental risk, to involve the public in development of categorical exclusions, and to periodically review and re-evaluate their categorical exclusions.

Not surprisingly, [BP's comments on the draft guidance](#) oppose any suggestion "that categorical exclusions are unusual or exceptional agency actions under NEPA." But events in the Gulf of Mexico are a powerful reminder that categorical exclusions should be the exception rather than the rule.